NORTH SIMCOE WASTE MANAGEMENT ASSOCIATION

LANDFILL ENVIRONMENTAL ASSESSMENT JOINT BOARD DECISION:

AN ISSUES ANALYSIS

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Environmental Assessment Branch
Ontario Ministry of the Environment

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Table of Contents

1 Introduction 1

2 Background 2

3 Issues Identification 3

4 Consideration of Alternatives 4
- 4.1 Alternatives to the Undertaking 4
- 4.2 Level of Detail for Alternatives to the Undertaking 5
- 4.3 Alternative Methods of Carrying Out the Undertaking 6
- 4.4 The No-Go Alternative 7

5 Planning Process and the Undertaking 8
- 5.1 Quality of the Planning Process 8
- 5.2 Technical Quality of the Undertaking 10
- 5.3 Role of Hydrogeology in Site Selection 12
- 5.4 Assessment of Community Impacts 13

6 Public Consultation 15

7 Decision on Acceptability of an EA 17

8 Hearing Process 19
- 8.1 Evidence at Hearings 19
- 8.2 Cooperation Among Parties 21

9 Equity and Social Justice 22

10 Conclusions and Recommendations 24
- 10.1 Conclusions 24
- 10.2 Recommendations 25

Executive Summary

The Joint Board hearing on the application by the North Simcoe Waste Management Association to construct and operate a new landfill in Tiny Township began on March 7th, 1989 and ended on September 21st, 1989, after a total of 66 hearing days. The Board issued its *Reasons for Decision and Decision* on the application on November 17th, 1989 and explained why the application was denied approval.

The North Simcoe Decision is of paramount importance to the practice of EA in Ontario. This decision marks the first time that an EA has been turned down on the basis of the planning process, despite the fact that the process produced an environmentally acceptable undertaking. It is a very strong endorsement of an interpretation of subsection 5(3) of the *Environmental Assessment Act* which requires that an environmentally acceptable undertaking be derived from a logically and consistently applied planning process which is technically sound, easy to follow and replicate in order for an Environmental Assessment to be found acceptable.

This report explores the issues surrounding the North Simcoe Joint Board Decision and identifies trends in the Board's decision-making. Based on this analysis, recommendations are made. Major recommendations include:

- All parties involved in the EA process should use the definition of alternatives to the undertaking and alternative methods of carrying out the undertaking which the Board developed in the North Simcoe Decision.

- All parties involved in the EA process should adopt the Board's interpretation of the planning requirements of the Act outlined above.

- Proponents should review their planning processes to ensure that they conform to these requirements.

- The Ministry of the Environment should develop a policy and planning guideline on what the Social Impact Assessment of an Environmental Assessment should contain.

1 Introduction

The Joint Board Decision regarding the North Simcoe Waste Management Association's application for a new landfill represents a hallmark decision for environmental assessment (EA) in Ontario. This decision is important not only because it is the first EA application to be turned down, but also because of the reasons for the denial of approval.

The application was denied on EA planning grounds, not on the environmental soundness of the undertaking. In this decision the Board is sending a clear message to all those involved in EA planning that the quality of the proponent's planning process is an integral and important part of the Board's decision-making process on EA applications. As a result, this decision warrants careful consideration by all parties involved in EA planning in Ontario to determine what lessons can be learned in order to improve current EA practice and increase the likelihood of success at future EA hearings. While decisions of one board are not binding on future decisions, they do reflect current Board policy and should be evaluated with that in mind.

This report is the second in a series of reports commissioned by the EA Branch which assess the EA planning implications of recent Board decisions. The first report entitled, *The Halton Region Landfill Environmental Assessment Joint Board Decision: An Issues Analysis*, focuses on the Halton Decision.

This report analyzes the EA planning and waste management issues in the Joint Board's Decision on the North Simcoe landfill application and discusses how they may impact on EA's and waste management master plans now underway. In addition, this report identifies trends which may be emerging in recent Board decisions and provides guidance on their implications for proponents, consultants and the public who are interested or actively involved in the EA process.

2 Background

The Towns of Midland and Penetanguishene, the Villages of Port McNicholl and Victoria Harbour, and the Township of Tay (the proponent) applied for approval to construct and operate a new sanitary landfill in Tiny Township to manage their domestic, solid and commercial wastes as well as those from Tiny Township.

Since October 1987, these municipalities have been sending their wastes to the Keele Valley site at a cost of $83.33 a tonne (cost current to May 1, 1989). During the course of the hearing, neither the proponent nor the intervenors provided a back-up plan for what to do with the wastes in the event that the application was denied and the Keele site was no longer available.

Prior to the use of the Keele Valley site, these municipalities used the privately owned Pauze site, located near the Town of Perkinsfield in Tiny Township. The Pauze site was rife with operational problems. A hydrogeological study in 1983 confirmed that leachate from the site was migrating into the aquifer which served as the water supply for the Town of Perkinsfield. As well, there was evidence of an even more serious plume caused by unauthorized dumping of liquid industrial waste. As a result of a mediated settlement between affected parties in June 1984, the parties agreed to continue landfilling at Pauze until October 1987; to install a municipal water system for Perkinsfield; and to continue efforts to establish a long term waste management system.

These efforts to establish a long term solution led to the preparation of a draft landfill EA released for public review in early March 1987. Following the formal submission of the EA to the Minister of the Environment for approval, the Government Review was published in July 1988. The Joint Board hearing on the application began on March 7th, 1989 and ended on September 21st 1989, with a total of 66 hearing days.

The proceedings at the hearings were coloured by the Pauze experience which "left a legacy of distrust and suspicion and explains, in part, the fierce opposition to this application" and the "deep-rooted opposition and resentment at the Association's attempts to establish a new site in Tiny" (North Simcoe Joint Board Reasons for Decision, p.7). At the hearing, both Tiny Township and the Wye Citizens' Group opposed the application, while the Ministry of the Environment supported the proponent's application.

3 Issues Identification

The Joint Board in its *Reasons for Decision and Decision* (referred to herein as the Decision) on the North Simcoe Waste management Association's landfill application made comments on EA matters throughout the report. Comments were made on the following areas:

- Consideration of alternatives
- Planning process and the undertaking
- Public consultation
- Decision on the acceptability of an EA
- Hearing process
- Equity and social justice.

Each of these areas will be discussed in the chapters that follow. Where appropriate, recent trends which appear to be emerging in each area will also be highlighted.

The trend analysis is based on a review of the following Board publications:

- Reasons for Decision and Decision on the Halton Landfill EA
- Reasons for Decision and Decision on the SNC Energy From Waste EA
- Reasons for Decision and Decision on the North Simcoe Landfill EA
- Reasons for Decision and Decision on the Town of Cobourg's *Environmental Protection Act* (EPA) Landfill Application
- EPA Decision on the Industrial Transfer Centres Ltd.(ITC) Application for a Hazardous Waste Transfer and Processing Facility
- Environmental Assessment Board Annual Report 1987-1988
- Environmental Assessment Board Annual Report 1988-1989.

4 Consideration of Alternatives

The Board presented its interpretation of alternatives to the undertaking, alternative methods of carrying out the undertaking, the level of detail required in the analysis of alternatives to the undertaking and the role of the "no-go" alternative. Each of these issues is discussed in detail below.

4.1 Alternatives to the Undertaking

The Board provides a clear definition of alternatives to the undertaking for waste management EA's. The Board defined an alternative to a landfill undertaking as an alternative which is "functionally different (from landfilling) eg. exporting outside the area, incineration with landfilling and energy from waste with landfilling" (North Simcoe Decision p.11).

While other recent Board decisions do not provide as clear a definition statement, discussion on this issue is consistent. In the SNC Decision, the Board indicates that alternatives to the undertaking should be determined based on the "functions of the undertaking" (SNC Decision p.30). In cases where the undertaking has a dual purpose such as waste disposal and energy production, then the proponent is required to evaluate alternatives to the undertaking for each function. In the SNC case, the Board found that in the EA documents submitted to the Minister, "the proponent identified appropriate alternatives to the energy production function but not to the waste disposal function of the undertaking" (SNC Decision pp. 30-31).

In the Halton Decision, the Board illustrated its definition of alternatives to the undertaking by example. The example is consistent with the one presented in the SNC Decision. The Halton Joint Board stated that,

> "It is our view that a proponent must have at least a rudimentary appreciation...of the practicality of alternatives to landfill which might reduce environmental degradation. A reasonable consideration of alternatives under section 5(3)(d) might include practicality of composting; residential waste reduction possibilities; anticipated reductions from industrial and commercial reuse and recycling; and, commercial and residential (including apartment buildings) source separation programs." (Halton Decision, p.164)

Implications

The Board has taken a consistent approach to the definition of alternatives to the undertaking for waste management EA's. This sends a clear message to all parties currently involved in the planning and preparation of waste management EA's and master plans on how to define alternatives to the undertaking. In addition, the Board has given advice on what alternatives to the undertaking should be examined.

The Ministry of the Environment's (MOE) *Interim Guidelines on Environmental Assessment Planning and Approvals* (Interim Guidelines on Environmental Assessment and Planning p.15) as well as its policy statement on *Environmental Assessment Planning and Approvals* define alternatives to the undertaking as functionally different alternatives. The *Guidelines* also present a waste management example which is consistent with the examples of the Board (Interim Guidelines, p.16). Since both the Board and the MOE define alternatives to the undertaking in the same manner for waste management undertakings, this should minimize any uncertainty that parties actively involved in waste management planning may have toward what constitutes alternatives to the undertaking for waste EA's.

Given the Board's comments in recent decisions on the need for a consistent and logical approach to planning, it is likely that the Board will endeavour to be consistent in the definition of alternatives to the undertaking that it adopts for other EA's such as transportation or energy EA's. As a result, all parties involved in the EA process should adopt this approach for other EA's and be guided by the examples of alternatives to the undertaking presented in the MOE *Interim Guidelines* (pp.15-17).

4.2 Level of Detail for Alternatives to the Undertaking

In its Decision, the North Simcoe Board accepted the financial constraints of the Association as being a legitimate limiting factor which constrained the analysis of alternatives to the undertaking.

> "The Board generally agrees that a more in-depth analysis of alternatives could have been undertaken. However, it recognizes that the municipalities involved are not large and that resources are limited. They considered costs to be important and a factor that could not be ignored...The Board finds, in the circumstances, that the evaluation of alternatives was adequate to satisfy the requirements of section 5(3) of the Act." (North Simcoe Decision, pp.13-14)

Since this is the first medium-sized municipal landfill EA application before the Board, it is impossible to identify any trends for medium-sized municipalities. However, it is likely that such a cursory examination of alternatives to the undertaking will not be acceptable for larger municipalities.

This conclusion is supported in the Halton Decision. The Halton Board chided the proponent for the "perfunctory " way in which alternatives to the undertaking were assessed. The Board felt that the proponent's analysis lacked "imaginative, creative solutions" and these alternatives were not treated in a "serious fashion" (Halton Decision p.163).

In the SNC case, the Board indicated that the alternatives to the undertaking were examined in detail through the evidence of the proponent and other parties (SNC Decision, p.31). While not providing direct guidance on level of detail, this remark, by implication, appears to suggest that this large undertaking required a detailed analysis of alternatives to the undertaking.

Implications

Recent Board decisions indicate that the Board expects a thorough and creative approach to the analysis of alternatives to the undertaking for waste management EA's. However, the Board appears to be willing to consider special circumstances, in the case of small and medium-sized municipalities with tight budgets, for example, when determining what should be an appropriate level of detail for the serious examination of these alternatives.

4.3 Alternative Methods of Carrying Out the Undertaking

The North Simcoe Board defined alternative methods of carrying out the undertaking as " methods of a similar technical character or methods which are functionally the same. Thus, in the case of an undertaking, which is a landfill site, an alternative method would be another different landfill site" (North Simcoe Decision, p.11).

The North Simcoe Decision is the first time that a Board has defined alternative methods of carrying out the undertaking. In both the Halton and SNC cases, one can only infer from their absence in the alternatives to the undertaking examples and discussion presented by the Board that alternative sites constitute alternative methods.

Implications

As with alternatives to the undertaking, the Board's approach to alternative methods of carrying out the undertaking is echoed by the MOE *Interim Guidelines* (p.15). This definition of alternative methods of carrying out the undertaking should be adopted by all parties involved in the EA process.

4.4 The No-Go Alternative

Previous Boards as well as the North Simcoe Board have expressed the view that the no-go alternative must be included as part of the evaluation of alternatives required in an EA. The North Simcoe Board also indicated that proponents as well as those in opposition have a responsibility to consider the implications of this alternative.

> " In spite of the apparent need for a waste disposal system," the Board said," there was almost a complete disregard of the consequences that might follow if the application was denied. The proponent did not deem it necessary to offer evidence of what may be termed the "no-go"alternative or situation. Nor did opposing parties seem overly concerned about waste disposal beyond their immediate goal of blocking the proponent's application. Mention was made of other possible sites but no evidence was submitted to support any viable alternative to the denial of this application if the Keele Valley Landfill is closed down in the not too distant future." (North Simcoe Decision, p.9)

Implications

The Board is sending a clear message to all proponents that an EA must contain a serious and thorough evaluation of the no-go alternative. Intervenors also have a responsibility to consider the implications of this alternative, especially where there is a clear need to take action to respond to a pressing problem.

5 Planning Process and the Undertaking

The North Simcoe Board deals with four main issues regarding the planning process and the undertaking for waste management EA's. The Board provides guidance on the type of planning process which is required, the technical soundness of the undertaking, the role of hydrogeology in the site selection process for landfills and how to assess community impacts for farming communities affected by landfill development. Each of these issues is discussed in detail below.

5.1 Quality of the Planning Process

The North Simcoe Joint Board has indicated that an EA planning process must meet the following criteria in order for the EA to be considered acceptable:

- it must be technically sound, logical and consistently applied
- it must be traceable; that is, easy to follow and understand
- it must be replicable; that is, a different person could reasonably come to the same conclusion as the proponent if the person were to duplicate the planning approach which was taken.

With respect to the first criterion, the Board stated that,

> "The exercise of identifying the 7 candidate sites, rather that following a logical plan, produced a mass of detail lacking both structure and intelligible direction...The major defect is the proponent's failure to apply the same level of investigation to the 7 sites before choosing the preferred site. There seems to be a predisposition to have site 41 selected as preferred - a predisposition that indicates bias...A method (paired comparison method) that results in different outcomes, merely by changing the order of comparisons between sites, cannot, in the Board's view, have much credibility." (North Simcoe Decision pp.29-31)

The Board adopted the position on traceability documented in the Government Review of the EA. This view is consistent with MOE's policy (Policy on Environmental Assessment Planning and Approvals pp.4-5) and guidelines (Interim Guidelines on Environmental Assessment Planning and Approvals pp.8,9,20,25). The Board notes,

> " the requirement for "traceability" mentioned in the Government Review...is taken to mean the ability to follow through, in a logical and systematic manner, the path chosen by the proponent in arriving at a preferred site. That element is absent...It is painful to see sincere and laborious efforts leading to such lamentable results. A simple, well-thought out process may have produced a more felicitous ending to the proponent's quest." (North Simcoe Decision pp.31-32)

With respect to replicability, the Board indicated,

> "Another concept that was discussed at the hearing was replicability. This is taken to mean that a different person could reasonably have come to the same conclusion as the proponent. The Board is able to say that the proponent's process defies replicability." (North Simcoe Decision p.32)

The Board concluded its remarks on the quality of the planning process by indicating that the requirements discussed above were implicit in subsection 5(3) of the EA Act.

> "Implicit in section 5(3) of the Act is a wide ranging investigation that involves a reasonable and logical application of criteria so that the final result is consistent with the steps taken along the way. The Board finds that the proponent's environmental assessment lacks the basic combination of reasonableness, consistency and systematic approach..." (North Simcoe Decision pp.32-33)

The Halton Decision was a precursor to the North Simcoe Board's strong stand on the quality required in an EA planning process. In the Halton Decision, the Board stressed the importance of applying a consistent and traceable approach to site selection (Halton Decision pp.57,152,153).

Implications

The North Simcoe Decision is of paramount importance to EA practitioners and other interested parties involved in environmental assessment planning because it

is the first time an EA has been turned down on the basis of the planning process, despite the fact that the process produced an environmentally acceptable alternative. The decision sends a clear signal to all proponents that the "ends do not justify the means". The planning process as well as the undertaking must be environmentally sound in order to obtain EA approval. It is a very strong endorsement of an interpretation of subsection 5(3) of the EA Act which requires that the undertaking be derived from a logically and consistently applied planning process which is technically sound, easy to follow and replicate in order for an EA to be ruled acceptable.

All parties involved in the EA process should adopt this interpretation of subsection 5(3) of the EA Act. Proponents involved in ongoing EA's should review their planning process and make changes, as required, in order to ensure that it conforms to these requirements.

5.2 Technical Quality of the Undertaking

The North Simcoe Board gives guidance on what constitutes a technically sound landfill site and indicates that technical soundness is a necessary but insufficient condition in order to obtain EA approval.

> " The Board considers ...site 41 (the undertaking) to be hydrogeologically suitable for landfilling...Yet, in the final analysis, the opposition evidence confirmed that the site could operate safely...If...in every case of a hydrogeologically suitable site, the Board would be compelled to grant approval...this would have the effect of nullifying both the wide definition of environment and the provisions of section 5(3) of the *Environmental Assessment Act*."(North Simcoe Decision pp.79,89,90)

In the Halton Decision, the Board outlined 7 matters which it considered to be of "considerable significance" when assessing the hydrogeological suitability of a site. They are:

- "The hydrogeology of the area must be comprehensible to the Board...
- The loss of contaminants should be minimal (and preferably zero), as a result of either natural containment or engineered works...
- Natural containment and attenuation of contaminants is preferred to engineered containment and attenuation...

- If it is predicted that contaminants may move away from a landfill site, the postulated contamination migration pathways should be predictable...

- It should be demonstrated that predicted leachate migration from the site will have no significant adverse impact on surface waters...

- Monitoring to identify contaminant escape and migration pathways should be straightforward...

- There should be the highest possible confidence in the effectiveness of contingency measures to intercept and capture lost contaminants..."(Halton Board Decision pp.109-112)

In both the Halton and North Simcoe Decisions, hydrogeological suitability was essential to a favourable decision being made by the Board on approval of a landfill site.

Under the *Environmental Protection Act* (EPA), the Board has taken a consistent approach to the approval of expansions to existing landfill sites. The City of North Bay landfill expansion, the Quinte Sanitation Limited application to continue operating at its site in Sidney Township and the Town of Cobourg's application for an interim landfill expansion have been judged by the Board according to criteria for expansions set by the Environmental Assessment Advisory Committee (EAAC) in its Report No.24.

The criteria established by EAAC and endorsed by the Board are:

> "The proposed expansion must not be at an existing site with significant on-going pollution problems or, if there are such problems, the municipality must show that it has developed, with public consultation, a pollution abatement strategy to deal with such problems, both in the short and long term. This strategy, along with a plan for implementation, must be included in the application for the *Environmental Protection Act* approval." (Environmental Assessment Board Annual Report Fiscal Year ending March 31st 1988 p.16)

The application of these criteria is exemplified here by the Town of Cobourg Decision. In this decision, the Board concluded that the site has ongoing pollution problems and that a proper strategy to remedy these problems was not developed (Town of Cobourg Decision pp.48-53). The Board denied approval because these deficiencies in the proponent's case provided the Board with " insufficient evidence on which to make a decision to approve the application for

an expansion to the Cobourg landfill site..."(Town of Cobourg EPA Decision p.53)

Implications

The Board has made it clear to proponents of landfill sites that they must provide well thought out plans for the operation of both existing and new landfill sites to minimize pollution problems. The Board has established criteria to determine hydrogeologic suitability and these should be addressed by proponents in applications for landfill approval under both the EAA and EPA.

Approval of expansions to existing sites will not be approved unless the Board is convinced that appropriate measures have been taken to address existing pollution problems and to minimize future ones which may occur as a result of the expansion.

While the Board seems predisposed to natural attenuation sites, this does not preclude approval of engineered containment sites. However, given the Board's preference, it is likely that proponents of engineered sites will have to thoroughly demonstrate that all reasonable efforts have been made to ensure that the site meets all the hydrogeological criteria over the life of the landfill.

5.3 Role of Hydrogeology in Site Selection

The North Simcoe Board endorsed MOE's position on the role of hydrogeological concerns in site selection.

> "The Board adopts the statement in the *MOE Review Criteria (Green Hat) Environmental Assessment on Waste Management* (Exhibit 275) at page 7 that states that a proponent should:
>
> "establish a minimum requirement for acceptability of hydrogeologic conditions to prevent the assessed relative importance of the other evaluation criteria from overwhelming the hydrogeologic conditions (i.e a site which is not acceptable hydrogeologically, should not be selected as the preferred alternative)"
>
> Thus hydrogeological acceptability is a *sine qua non* of a preferred site and it is a waste of time, energy and money to consider sites that do not hold out promise of meeting this basic requirement." (North Simcoe Decision p.26)

Implications

When identifying and evaluating alternative sites for landfilling, proponents should give sufficient weight to hydrogeological impacts to ensure that hydrogeologically acceptable sites are chosen.

5.4 Assessment of Community Impacts

In the North Simcoe Decision, the Board has given guidance on how to evaluate community impacts of farming communities. Because of the importance of these impacts, the Board believes that they should be treated separate from impacts on the agricultural resource base.

> "The counting of residences may be useful in evaluating effects of an urban community, but farm operations are much more than a family residence. Farm operations also constitute a family business and a part of an important provincial industry. These aspects of the community were not considered in the environmental assessment. Even the consideration of community was relegated to a component in the agricultural resource factor, hardly a justifiable position, in the Board's view." (North Simcoe Decision p.43)

The Board indicated that it would like to see the social impact assessment of these communities include:

- the magnitude of some of the farm businesses eg. large dairy operations
- descriptions of dependent family and/or partnership working arrangements for sharing work, equipment and property
- descriptions of specialized farms in the area eg. organic farms

"Without such information the proponent could not, in the Board's view, evaluate the possible risks that might face the community." (North Simcoe Decision p.42)

The Halton Decision also provided guidance to proponents and SIA experts on how the assessment should be carried out (Halton Decision pp.17-28). The Board indicated that SIA's should consider the following:

- actual expressions of concern of individuals, not just the subjective perceptions of impacts observed by the SIA expert. SIA assessors must interact directly with potentially affected populations.

- actual cause and effect relationships between stress on a community and the perceptions of community citizens about stress. SIA assessors should take into account the emotional manifestations which occur when people are subject to a new situation which they perceive as bad.
- social impacts of dust, odour, litter and visual intrusion
- the presentation of an internally consistent evaluation
- the aggregation and categorization of the feelings of a large number of people in order to make them most useful to the hearing process
- the impact on workers in the area and any reasonable mitigation measures.

Implications

SIA has become a recognized component of EA's in Ontario. In two recent decisions, the Board has provided guidance to practitioners on how to assess various community impacts. This guidance should be integrated into the assessment of impacts for all EA's.

MOE should develop a policy and guideline on what the SIA component of EA's should contain. It should build on the matters which the Board feels should be included in this type of analysis.

6 Public Consultation

The Board has been a strong supporter of public consultation over the years. The North Simcoe Decision reaffirms that commitment and presents the Board's views on the role and importance of public consultation in the EA process.

The North Simcoe Board indicated that public involvement can serve two primary purposes.

> "A proponent is able to learn the attitudes and concerns of the public and, in the best of circumstances, may be able to take such steps as will eliminate or ameliorate those concerns. At other times, a project may be misunderstood and an explanation by knowledgeable individuals might have the effect of reducing apprehensions. However, in the case of a landfill site, no amount of explanation or suggested mitigating measures will mute the objections and resistance of neighbouring residents and this is understandably so.
>
> The second purpose of public involvement is the revelation of factual information concerning the local environment. The local population possesses information that can easily escape the attention of professionals however experienced the latter may be." (North Simcoe Decision p.23)

The Board urges proponents to involve the public early in the planning process in sincere efforts to resolve concerns.

> "It is to a proponent's advantage to apprise itself of the views, concerns and information at an early stage where some form of dialogue may take place rather than in the adversarial process of a hearing where positions and attitudes have hardened. In this way, changes can be made to resolve concerns." (North Simcoe Decision pp.24-25)

The Board criticized the proponent for not involving the public in the site selection process and noted that in the Halton Landfill situation the public was directly involved. In that case, the public was asked to rank the order of priorities of environmental factors (North Simcoe Decision p.24).

Implications

Given the Board's firm commitment to public consultation and the recent practice of the Board to award costs against intervenors, it would be wise for all those who are involved in EA planning processes to participate in a manner which encourages a productive dialogue among participants; facilitates problem resolution, where possible; and which improves, rather than frustrates, the planning process.

7 Decision on Acceptability of an EA

The North Simcoe Decision is the first time that a Board has given a decisive interpretation of its decision-making powers under the EA Act related to the acceptability of an EA. In this decision, the Board makes it clear that it is not confined to the powers that the Minister is expressly given in the statute. Unlike the Minister, the Board believes that it has the power not to accept an EA, and exercised that power in the North Simcoe case.

The Board provided the justification for its decision-making powers with respect to the acceptability decision and explained how it arrived at the decision that the North Simcoe EA was unacceptable.

> "Section 9 makes it clear that the Minister shall accept the environmental assessment when he is of the opinion that the environmental assessment is satisfactory to enable a decision to be made whether approval to proceed should or should not be given.
>
> The meaning of unsatisfactory is given in section 11(1) to be " does not comply with this Act", (or) "is inconclusive...". The Board finds that the environmental assessment is unsatisfactory because the requirements of section 5(3) have not been met. A process or planning or methodology is implicit in that section and further it should be reasonable. The proponent's efforts in reaching a short list of 7 sites lacks any semblance of structure or method and the process used in the comparative analysis is deficient and biased. The Board, therefore cannot accept the environmental assessment...
>
> Yet section 12(2(c) requires the Board to make a decision as to acceptance *or* amendment and acceptance. The third alternative i.e. non-acceptance is not mentioned...One may argue.. that if the Board has the power and jurisdiction to accept, it follows that it also has the power and jurisdiction not to accept.
>
> There are several reasons why the Board may have the benefit of the third option of non-acceptance which is denied to the Minister. First, there is doubt whether the Board has the same powers as the Minister, as set out in section 11(1), to order the proponent to carry out research, investigations studies and monitoring programs. Secondly, even if the Board did have such powers so as to allow it

to amend and accept the environmental assessment those powers would only address factual deficiencies and not process and so would not cure the flawed nature of the environmental assessment. Thirdly, even if the Board possessed those powers and those powers were expanded to address the environmental assessment process, the result would be a reformulation of almost the entire environmental assessment - in effect a new environmental assessment. This reformulation could very well lead to the choice of a different site (a different undertaking) in respect of which proper notice has not been given.

Lastly, the Board is in a different position than the Minster since it has had the benefit of a comprehensive hearing and has had extensive information and evidence presented to which the Minister might not have had access. The conclusion of a hearing is too late in the day for an order requiring back-tracking to the initial stages of the environmental assessment process where more than just additional and supplementary information is required. Logic and good sense dictate a new environmental assessment and a new hearing with a fresh notice if the proponent wishes to continue in its efforts." (North Simcoe Decision pp.35-37)

Implications

The North Simcoe Decision makes a significant contribution to the debate on the value of the acceptability decision in the EA Act. The Board has demonstrated that the decision on acceptability can be a major tool for encouraging proponents to conduct proper planning processes in conformity with subsection 5(3) of the Act.

Although this is the first decision which interprets the acceptability provisions of the EA Act as they apply to the Board, it is unlikely that the Board's position will change unless the courts overturn its position.

8 Hearing Process

The North Simcoe Board provides guidance to parties at hearings regarding the type of evidence to be presented and the need for cooperation among parties. Each of these is discussed below.

8.1 Evidence at Hearings

The North Simcoe Board has made it clear that it expects intervenors to ensure that they present evidence which is relevant to matters at issue. The Board chastised some intervenors for providing "evidence of no assistance" or which was "superfluous" and reflected these conclusions in the awarding of costs for the hearing.

The Board stated,

> "It is, thus, incumbent on the parties to critically analyze their concerns and to determine the importance or relevance of the evidence they propose to call. "(North Simcoe Decision p.91)

As well, the Board indicated that expert testimony at hearings should be designed to assist the Board in making its decision. "The Board should be able to rely on expert opinions being fair and objective whether or not such experts are called by the proponent or the objector. Experts should never be advocates."(North Simcoe Decision p.90)

The Board has echoed similar concerns in other recent decisions. In the Halton Decision, the Board criticized experts for being reluctant to provide information that would jeopardize their client's position (Halton Decision p.168) and faulted non-expert witnesses for digressing into areas irrelevant to the issues before the Board (Halton Decision p.163). In the Town of Cobourg EPA Decision, the Board criticized some of the proponent's experts as being "inconsistent, tendentious and, on occasion, obfuscatory". (Town of Cobourg EPA Decision p.47)

In addition, the Board dealing with the Industrial Transfer Centres Ltd. application demonstrated the importance of bringing evidence before the Board which thoroughly covers major aspects of the application and the dangers which can occur if major changes are made to the undertaking during the course of the

hearing. The Board dismissed the hearing because "we have found crucial faults in the present evidence that were not proposed to be addressed by the evidence to be called...There was such a serious change to the application that Board members felt that the Director of Approvals should be given the opportunity to review a new, clean proposal, should the proponent choose to make such a proposal." (ITC Decision p.8)

The Board formally chastised MOE for allowing an incomplete application to come before the Board by awarding some costs against the Ministry.

> "With respect to awarding costs against the Ministry, Ms. Couban, counsel for the Ministry argued that costs should not be awarded against the Ministry. But Ms. Couban acknowledged that the Ministry had prematurely referred the application from Industrial Transfer Centres to the Board as the application was lacking in technical detail. Ms. Couban advised the Board at the outset of the hearing that the Ministry was aware of the deficiencies in the application and was confident that these deficiencies would be dealt with properly and overcome during the course of the hearing...The Board agrees that the Ministry must share some responsibility, for the reasons stated earlier, and orders the Ministry of the Environment to pay Mr. T.A. Richardson $5 081.82 for legal fees and Mr. M. Quinn $3 151.98 as its partial payment of the engineering fees." (ITC Decision pp.11,13)

Implications

The Board is very concerned about the costs of hearings and the time that they take. Not only does the Board want to streamline the hearing process, but also the Board would like to ensure that there is sufficient evidence before it in to justify the commencement and continuation of a hearing. This explains in large measure the tough statements that the Board has made over time regarding the presentation of evidence at hearings and its use of cost awards against certain intervenors.

It appears that the Board views the streamlining of hearings as a shared responsibility with the proponent and the other intervenors at the hearing and expects all parties to ensure that their evidence is presented in a manner which is helpful to the Board. If this is done, the Board believes that time and money will be saved.

While it may be difficult for the proponent's experts not to appear as advocates, the best way of minimizing this perception is to be forthcoming with evidence in

response to clear questions under cross-examination. Witnesses should make all reasonable efforts not to hide or confuse the facts, or to make exaggerated remarks in favour of the quality of the client's case.

8.2 Cooperation Among Parties

The North Simcoe Board stressed the importance of cooperation among parties to ensure the relevance of all the evidence which is presented. The Board found that this type of cooperation was lacking at this hearing.

> "Greater cooperation among counsel might have contributed to the reduction of repetitious or irrelevant evidence...it is the Board's view that significant cooperation can be effected without prejudicing one's case."(North Simcoe Decision pp.91-92)

This view was also expressed by the Board in the Halton Landfill Decision through the awarding of costs. As well, the Halton Board cautioned proponents against the failure to deliver documents in a timely manner to opponents as this practice is not helpful to the Board (Halton Decision p.164).

Implications

The Board expects all parties to take some responsibility for the time and money spent at hearings and in so doing should ensure that all parties cooperate to streamline the proceedings.

9 Equity and Social Justice

While not at issue before the North Simcoe Board at the hearing, the Board considered whether the interest of the area's population should take precedence over those directly affected by the landfill site. The Board indicated that under the EPA, it would be compelled to approve a site as long as it was safe. However, under the EA Act, the Board has to consider the broader environmental impacts and alternatives and need not approve a hydrogeologically suitable site if the hardships on nearby residents are found to be too severe.

> "Should not the interest of the area's population numbering some 34 000 augmented by 7 000 vacationers, who benefit from a landfill site, not override the interest of much fewer numbers of residents who will be directly and adversely impacted by the site? If it can be proven that there is sufficient groundwater and surface water protection, should not the benefits accruing to the majority outweigh the discomfort, disruption and possible displacement to be endured by the few?
>
> If numbers were the deciding factor, then in every case of a hydrogeologically suitable site, the Board would be compelled to grant approval irrespective of the hardships that the undertaking would inflict on nearby residents whose numbers would be very much smaller than the population that would benefit. This would have the effect of nullifying both the wide definition of environment and the provisions of section 5(3) of the *Environmental Assessment Act*. It would place the Act in the same category as the *Environmental Protection Act* which is concerned primarily with the natural environment and where a comparison of alternatives is not required." North Simcoe Decision pp. 88-89)

In the Halton Decision, the Board also made comments on social justice and equity issues. The Board indicated that it did not concur with the view that the source of the wastes should affect its decision on social equity (Halton Decision p.11). As well, this Board went further to say that it did not agree that the presence of an existing landfill obliged the Board to weigh the evidence in favour of either an expansion to that site or a new landfill in that community (Halton Decision p.136).

Implications

The Board has demonstrated that under the EA Act, nearby residents are well protected from a broad range of negative impacts, including natural environmental impacts. This is in sharp contrast to approvals of landfills under the EPA which protect nearby residents only from negative natural environmental effects.

10 Conclusions and Recommendations

10.1 Conclusions

The North Simcoe Decision is critically important to the practice of EA in Ontario. It is the first decision that makes it clear to all parties involved in EA's throughout the province that the quality of the planning process is an integral and important part of the Board's decision-making process on EA applications.

In the past, Boards have pointed out that the requirement to consider alternatives and a broad definition of environment separate the *Environmental Assessment Act* from the *Environmental Protection Act*. This decision adds to those distinctions by indicating that implicit in subsection 5(3) is the requirement for a technically sound, logically and consistently applied planning process, which is easy to understand and follow, and which can be replicated by a reasonable lay person. In so doing the Board has set a new standard for EA requirements and has sent out a warning to all proponents that if their EA planning process does not meet this standard, then they should consider revising their approach.

Further, the Board has strengthened and clarified the acceptability decision under the EA Act, making it a valuable tool in ensuring that environmentally sound planning takes place. To be able to rule that an EA is acceptable, the Board has indicated that the EA must meet subsection 5(3) of the EA Act. Unlike the Minister of the Environment, the Board has determined that it has the power not to accept an EA and to end the hearing proceedings on that basis. The Minister, on the other hand, must accept, or amend and accept an EA. If found unsatisfactory, the Minister must order further research to address weak areas of the EA in order to make it acceptable. The Board has stated that ordering further research at the hearing would be too late in the process. Therefore, if a planning process was found to be seriously flawed, it would be more appropriate for the Board to find the EA unacceptable.

In addition, the Board has reaffirmed its commitment to streamlining the hearing process. The Board reiterated the position of the Halton Joint Board that streamlining is a joint responsibility shared by the Board as well as all participants at the hearing. It is likely that the Board will continue to use its powers to award costs to penalize those who frustrate the hearing process.

Finally, the Board reinforced the need for proper analysis of community impacts in an EA. A competent and thorough social impact assessment has now become a necessary component of EA impact analysis.

10.2 Recommendations

Based on the analysis of the North Simcoe Decision and the identification of recent trends in Board policy which may be emerging, the following recommendations are made:

Consideration of Alternatives

- All proponents should adopt the definition of alternatives to the undertaking and alternative methods of carrying out the undertaking which the Board developed in the North Simcoe Decision. Proponents of EA's, other than waste EA's, should be guided by the examples of the application of these definitions to non-waste EA's presented in MOE's *Interim Guidelines on Environmental Assessment and Approvals*

- All proponents should conduct and present a serious examination of alternatives to the undertaking which takes into account, in a reasonable manner, the constraints that they may fac

- Proponents should do a thorough analysis of the no-go alternative as part of the rationale for justifying the need for the undertaking.

Planning Process and the Undertaking

- All parties involved in the EA process should adopt the North Simcoe Board's interpretation of subsection 5(3) which requires that the undertaking be derived from a logically and consistently applied planning process which is technically sound, and easy to follow and replicate.

- Proponents involved in ongoing EA's should review their planning process and make the necessary changes in order to ensure that it conforms to these planning requirements. Proponents about to begin the EA process should ensure that the planning process that they intend to carry out meets these requirements fully.

- Proponents of landfill EA's should ensure that their undertakings thoroughly address all the criteria established by EAAC and endorsed by the North Simcoe Board, with respect to pollution control. Proponents should also ensure that the criteria established by the Halton Board for

hydrogeologic suitability of a landfill site are fully met. In addition, when identifying and evaluating alternative landfill sites, proponents should give sufficient weight to hydrogeological impacts to ensure that hydrogeologically acceptable sites are assessed.

- Proponents should carry out a thorough assessment of community impacts in each EA. At minimum, the SIA should address the concerns that both the North Simcoe and Halton Boards identified in their decisions.

- MOE should develop a policy and guideline on what the SIA component of an EA should contain. The contents should build on the matters which the Board has indicated should be addressed in the SIA.

Public Consultation

- All participants in EA planning processes should participate in a manner which encourages a productive dialogue among participants, facilitates problem resolution, where possible, and which improves, rather than frustrates, the planning process.

Decision on Acceptability

- The acceptability decision should remain a key decision point in the EA Act.

Hearing Process

- Both proponents and intervenors should ensure that the evidence they present is relevant, fair and appears to be fair. Witnesses should make all reasonable efforts not to hide or confuse facts, or to make exaggerated remarks in favour of the quality of their client's position.

- Both proponents and MOE should exercise due diligence in ensuring that only complete applications are heard before the Board.